STATE OF MICHIGAN

COURT OF APPEALS

LAURA K. FUNDUNBURKS,

Plaintiff-Appellee,

v

CAPITAL AREA TRANSPORTATION AUTHORITY and MICHELLE BEARD,

Defendants-Appellants.

UNPUBLISHED
May 31, 2007

No. 274928
Ingham Circuit Court
LC No. 06-000062-NI

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendants Capital Area Transportation Authority ("CATA") and Michelle Beard appeal as of right from the trial court's order denying their motion for summary disposition based on governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Laura K. Fundunburks was a passenger on a bus owned by CATA and operated by Beard. When the bus reached plaintiff's stop and she was disembarking through the rear doors, the doors closed, striking plaintiff in the foot and causing her to fall to the pavement. Plaintiff sustained injuries to her knees that subsequently required surgery. She filed suit alleging that CATA was liable for her injuries under the motor vehicle exception to governmental immunity, MCL 691.1405, and that Beard operated the bus in a grossly negligent manner. MCL 691.1407(2)(c).

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7). Defendants argued that the motor vehicle exception did not apply because the bus was stopped at the time the accident occurred, and because the closing of the bus doors was not directly associated with the operation of the bus as a motor vehicle. Defendants also argued that reasonable minds could not disagree that Beard's actions, while perhaps constituting ordinary negligence, did not constitute gross negligence.

The trial court denied defendants' motion. The trial court, relying on *Helfner v Center Line Public Schools*, unpublished per curiam opinion of the Court of Appeals, issued June 20,

2006 (Docket No. 265757), found that temporary cessation of forward movement of a bus did not mandate a conclusion that the bus was no longer being used as a motor vehicle.[1] The trial court denied the motion with respect to Beard on the ground that it was premature because discovery had not been completed.

We review de novo a trial court's decision on a motion for summary disposition. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 477; 586 NW2d 760 (1998). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), we must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. *Id*. The motion is properly granted only if no factual development could provide a basis for recovery. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996). The applicability of governmental immunity is a question of law that we review de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Under the governmental immunity act, a governmental agency is liable for bodily injury and property damage resulting from the negligent operation by an officer, agent, or employee of the governmental agency of a motor vehicle of which the governmental agency is the owner. MCL 691.1405. For the exception to apply, the injury must result from the negligent operation of a motor vehicle *as* a motor vehicle. *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002). "[T]he 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Id*. at 320-322.

Governmental employees are immune from liability for injuries they cause in the course of their employment if they are acting within the scope of their authority, if the governmental agency is engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial

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[1] In *Helfner*, *supra*, a school bus driver deactivated warning lights on the bus, and a vehicle that had been stopped alongside the bus proceeded forward. At the same time, a child who had been ordered off the bus, proceeded across the street in front of the bus, and was struck by the vehicle. *Id*. at 1-2. A majority of this Court found that "[t]emporary stops are an integral part of the driving of a school bus," and the fact that the school bus was "temporarily at rest" did "not take it outside the motor vehicle exception under these circumstances." *Id.* at 2-3. Further, the majority found that even though there was no physical contact between the bus and the child, or the vehicle that struck the child, the motor vehicle exception was nevertheless applicable because the driver, in effect, placed an object, the vehicle, in motion by prematurely deactivating the bus warning signals, and thus the child's injuries could be found to have "resulted from" the driver's operation of the bus. *Id*. at 4. Chief Judge WHITBECK dissented, concluding that because the government vehicle did not directly place the injury-causing object into motion, the child's injuries did not result from the negligent operation of the bus. *Helfner*, *supra* at 2 (WHITBECK, C.J., dissenting). The Supreme Court reversed this Court's decision for the reasons stated in the dissenting opinion, and remanded the case to the trial court for entry of summary disposition in favor of the defendants. *Helfner v Center Line Public Schools*, 477 Mich 931; 723 NW2d 459 (2006).

lack of concern for whether an injury results." MCL 691.1407(2)(c). To be the proximate cause of an injury, the gross negligence must be "the one most immediate, efficient, and direct cause" of the injury or damage. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

We find no error in the trial court's denial of defendants' motion for summary disposition. The motor vehicle exception to governmental immunity encompasses those activities that are directly associated with the driving of a motor vehicle. *Chandler, supra* at 320-321; *Poppen v Tovey*, 256 Mich App 351, 355; 664 NW2d 269 (2003). Under the circumstances of this case, plaintiff's injuries stemmed from activities directly associated with the driving of the bus, and therefore fall within the motor vehicle exception to governmental immunity.

It is undisputed that the bus was in operation as a motor vehicle at the time of the injury, albeit, momentarily stopped to permit plaintiff to disembark, and the injury occurred as the driver closed the bus doors to drive forward. As defendants point out, the bus is equipped with a safety locking mechanism that automatically locks the drive shaft and prevents the bus from being driven when the doors are open; thus, the closure of the doors was integral to driving the bus forward.

Defendants argue that once the bus stopped to drop plaintiff off, it ceased to be engaged in activities directly related to driving. We find this argument unpersuasive and the cases supporting it distinguishable. Although there are several circumstances in which a stopped bus could be found to not be engaged in activities directly associated with driving, this is not one of those circumstances. This is not a situation in which the bus was parked in a bus barn for maintenance, and thus not in operation as a motor vehicle, *Chandler, supra* at 316, 322 (the plaintiff was injured while prying open the bus doors, which had closed on the driver, who was leaving the bus). Nor is this a circumstance in which the vehicle was stopped, i.e., "parked" temporarily, and the driver had left the vehicle to engage in other activity, *Poppen, supra* at 352, 355-356 (the plaintiff driver collided with a city water truck that was stopped in a traffic lane with its emergency flashers and warning lights activated while the driver was inspecting a fire hydrant). Likewise, it is not a case in which the alleged injuries stem from the negligent maintenance of a vehicle, *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492, 494, 501; 722 NW2d 262 (2006) (the plaintiff alleged that injuries sustained in a fall while disembarking a city shuttle bus resulted from the failure to remove ice and snow on the bus steps or install step heaters). Thus, the cases relied on by defendants, including *Chandler, Poppen*, and *Martin*, are distinguishable. Here, the alleged injuries occurred during an act integral to the driving of the motor vehicle and, logically fall with the motor vehicle exception for negligent "operation" of a motor vehicle.

Defendants also characterize this case as one involving "negligent use of the bus doors" that fails to come within the motor vehicle exception. We find this characterization inapt. To functionally isolate the closing of the bus doors, which are physically linked to the operation of the bus, as an activity unrelated to driving the bus, has no grounding in logic. Plaintiff's injury occurred in the operation of the vehicle as a motor vehicle. Contrary to defendants' assertion, we find no meaningful legal parallel in a driver's failure to close a tailgate, *Orlowski v Jackson State*

Prison, 36 Mich App 113; 193 NW2d 206 (1971), which defendants argue is merely an activity *indirectly* associated with driving and therefore not within the motor vehicle exception.

Finally, we disagree that the trial court's reference to the analysis in *Helfner*, which was subsequently reversed, mandates reversal in this case. As indicated by our analysis above, the trial court's observation—that the temporary cessation of movement of a bus does not mandate a conclusion that the bus was no longer being used as a motor vehicle—remains sound. *Helfner* was reversed for the reasons stated in the dissenting opinion, and nothing in Judge WHITBECK'S dissent undermines the trial court's observation in this case. Rather, as noted *supra*, n 1, Judge WHITBECK merely concluded that because the government vehicle "did not directly place the injury-causing object into motion," the child's injuries did not result from the negligent operation of the bus. Accordingly, the basis for reversal in *Helfner* addresses an entirely different requirement for the motor vehicle exception to governmental immunity. See *Martin*, *supra* at 497-498 (for the exception to apply, a plaintiff must satisfy three requirements, including that the injuries (1) *resulted from* (2) the negligent *operation* of (3) the defendant's *motor vehicle*.

With regard to the trial court's denial of summary disposition of the claim against Beard, we likewise find no error requiring reversal. Given that Beard's deposition had not been taken when defendants' motion for summary disposition was heard, the trial court's conclusion that the grant of summary disposition would be premature was sound. Viewing the evidence presented at the time the motion for summary disposition was considered, plaintiff raised a genuine issue of material fact concerning whether Beard's actions constituted gross negligence. Any evidence to the contrary, for instance, from Beard, had not been presented.[2]

According to plaintiff's deposition, she was in the process of disembarking the bus, and when she looked down, the doors started to close. Her complaint indicated that the doors hit her foot, and that as a result, she fell to the pavement. She could hear people yelling that someone was falling and to stop the bus, but the driver did not stop. Plaintiff saw the driver brake momentarily, but then she just continued driving away. Viewing the evidence in the light most favorable to plaintiff, reasonable minds could differ regarding whether Beard's actions constituted "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," i.e., constituted gross negligence. MCL 691.1407(2)(c).

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff

[2] According to plaintiff, Beard's deposition had not yet been taken because her identity as the driver of the bus in question was not known for some time, and she was not added as a defendant until several months after the complaint was filed.